Awana Properties Sdn Bhd v Eterbina Development Sdn Bhd

HIGH COURT (IPOH) — CIVIL SUIT NO AA-22NCvC-5–01 OF 2020
SU TIANG JOO JC
26 NOVEMBER 2020

Land Law — Caveats — Caveatable interest — Whether defendant with irrevocable power of attorney had caveatable interest — Whether finding that caveator has caveatable interest would be res judicata during the trial

This was an application by the plaintiff for summary judgment against the defendant. The plaintiff was the registered owner of 18 lots of land ('18 lots of land') which were charged to Affin Bank Bhd ('the chargee'). Under a joint venture agreement ('JV agreement') made on 21 July 2017 with the plaintiff to develop the 18 lots of land, the defendant agreed to construct and complete 12 units of double storey shop/office on PT 24150 to 24161, three units of four storey shop/office on PT 24162 to 24164 and three units of double storey shop/office on PT 24165 to 24167 ('the project'). The JV agreement provided that simultaneously with the execution of the agreement and upon the initial payment of RM100,000, the plaintiff shall execute a power of attorney in favour of the defendant. A power of attorney dated 21 July 2017 was in fact given by the plaintiff to the defendant and duly registered with the registration number 56126/17 ('PA'). The defendant caused a private caveat to be entered over the 18 lots of land under Presentation Number 19523/2019 ('the said caveat'). Out of the 18 lots of land, one lot held under HS (D) 216255 PT 24166 with a building to be erected thereon was sold pursuant to a sale and purchase agreement with the defendant as developer, the plaintiff as landowner and two co-purchasers for RM800,000 leaving 17 lots of land ('the remaining 17 lots').The plaintiff applied for summary judgment ('encl 8') under O 14 r 1 of the Rules of Court 2012 and sought for an order that the defendant's caveat over 17 lots of its land be removed. The plaintiff claimed that the defendant had failed to obtain the requisite certificate of construction and completion for the buildings to be constructed on or before October 2019 and that the defendant had failed to pay the monthly instalment payments of RM37,652 per month due to the chargee for the months of September and October, 2019 and by reason thereto the defendant had breached the JV agreement and the plaintiff was therefore entitled to terminate the same. By notice dated 11 November 2019, the plaintiff terminated the JV agreement and had proceeded to sell the remaining 17 lots to various other purchasers. On 3 January 2020, the plaintiff came to know that the defendant had entered the said caveat which had caused the plaintiff to be unable to complete its agreements of sale of the remaining 17 lots and by reason thereto had suffered damages including additional costs for construction and infrastructure. In

hearing the plaintiff's application for summary judgment, the court was tasked with deciding the issue of whether the defendant under the JV agreement with an irrevocable power of attorney to deal with the proprietary rights over the land including to let, lease, assign and create charges or any other encumbrances over the land had a caveatable interest in the land.

Held, dismissing the application with costs:

(1) The court was satisfied that the plaintiff was entitled to apply for summary judgment because O 14 r 1 of the Rules of Court 2012 allowed the plaintiff to apply for summary judgment on the ground that the defendant had no defence to a particular part of a claim (see para 28).

(2) The court was guided by three stage test laid down in the Court of Appeal authority of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719. The court was satisfied that the defendant had claimed title to or a registrable interest in alienated land in the form of the properties or a right to such title or interest as required under s 323(1)(a) of the National Land Code and by reason thereto had satisfied the first stage test. While the plaintiff had claimed that it had terminated the JV agreement and that the defendant was only entitled to be refunded the plaintiff's entitlement, this was a serious question meriting trial because such assertion was only accurate if the JV agreement was lawfully terminated and the defendant had challenged the plaintiff's purported termination. With the defendant challenging the purported termination of the JV agreement, seeking specific performance of the same, seeking a mandatory injunction to compel the plaintiff to allow it to complete the project and the allegations of the sham sale and purchase transactions entered into only one day after the purported notice of termination issued by the plaintiff's solicitors on 11 November 2019, the court was more than satisfied that there were serious questions meriting trial and the court held that the defendant had passed the second stage test. The court found that given the unrebutted assertion, the balance of convenience favoured the defendant for the caveat to remain (see para 38).

(3) The court was of the opinion that it would be too simplistic an argument to assert that a JV agreement for the development of land simpliciter by itself would conclusively lead to a joint venture developer having no caveatable interest. Instead, the terms of the joint venture agreement should be studied and construed for its terms and effects. In the instant case, the clauses in JV agreement on the owner's entitlement and how they were to be apportioned if the units were not sold could reasonably be construed to mean that the plaintiff was only entitled to RM6m with all the units being the entitlement of the defendant developer (see paras 39–41).

[Bahasa Malaysia summary

Ini adalah permohonan plaintif untuk penghakiman terus terhadap defendan. Plaintif adalah pemilik berdaftar sebanyak 18 lot tanah ('18 lot tanah') yang telah dicagarkan kepada Affin Bank Bhd ('penerima cagaran'). Di bawah perjanjian usaha sama ('perjanjian JV') yang dimasuki pada 21 Julai 2017 dengan plaintif membangunkan 18 lot tanah, defendan bersetuju untuk membina dan menyiapkan 12 unit kedai/pejabat dua tingkat pada PT 24150 hingga 24161, tiga unit kedai/pejabat empat tingkat pada PT 24162 hingga 24164 dan tiga unit kedai/pejabat dua tingkat pada PT 24165 hingga 24167 ('projek'). Perjanjian JV tersebut memperuntukkan bahawa pada masa yang sama dengan pelaksanaan perjanjian dan apabila bayaran permulaan sebanyak RM100,000, plaintif hendaklah melaksanakan surat kuasa wakil yang memihak kepada defendan. Surat kuasa wakil bertarikh 21 Julai 2017 sebenarnya diberikan oleh plaintif kepada defendan dan didaftarkan dengan nombor pendaftaran 56126/17 ('PA'). Defendan menyebabkan kaveat persendirian dimasukkan ke atas 18 lot tanah di bawah Nombor 19523/2019 ('kaveat tersebut'). Dari 18 lot tanah, satu lot yang dipegang di bawah HS (D) 216255 PT 24166 dengan sebuah bangunan yang akan didirikan di atasnya telah dijual menurut perjanjian jual beli dengan defendan sebagai pemaju, plaintif sebagai pemilik tanah dan dua pembeli bersama dengan harga RM800,000 meninggalkan 17 lot tanah ('baki 17 lot'). Plaintif memohon penghakiman terus ('lampiran 8') di bawah A 14 k 1 Kaedah-Kaedah Mahkamah 2012 dan memohon perintah supaya kaveat defendan ke atas 17 lot tanahnya dikeluarkan. Plaintif mendakwa defendan gagal mendapatkan sijil pembinaan dan penyiapan bangunan yang akan dibina pada/atau sebelum Oktober 2019 dan defendan gagal membayar ansuran bulanan sebanyak RM37,652 sebulan disebabkan caj bagi bulan September dan Oktober 2019 dan dengan alasan defendan telah melanggar perjanjian JV tersebut, seterusnya plaintif berhak untuk menamatkannya. Melalui notis bertarikh 11 November 2019, plaintif telah menamatkan perjanjian JV tersebut dan telah menjual baki 17 lot kepada beberapa pembeli lain. Pada 3 Januari 2020, plaintif mengetahui bahawa defendan telah memasuki kaveat tersebut yang telah menyebabkan plaintif tidak dapat menyelesaikan perjanjian penjualan baki 17 lot dan dengan alasan ianya telah mengalami kerosakan termasuk kos tambahan untuk pembinaan dan infrastruktur. Semasa mendengar permohonan plaintif untuk penghakiman terus, mahkamah ditugaskan untuk memutuskan isu sama ada defendan di bawah perjanjian JV dengan kuasa peguam yang tidak boleh dibatalkan untuk menangani hak proprietari ke atas tanah itu termasuk untuk membiarkan, memajak, menyerah hak dan membuat sebarang urusan lain ke atas tanah tersebut mempunyai kepentingan kaveat di atas tanah itu.

Diputuskan, menolak permohonan dengan kos:

(1) Mahkamah ini berpuas hati bahawa plaintif berhak memohon penghakiman terus kerana A 14 k 1 Kaedah-Kaedah Mahkamah 2012

membenarkan plaintif memohon penghakiman terus atas alasan bahawa defendan tidak mempunyai pembelaan terhadap bahagian tertentu di dalam tuntutan tersebut (lihat perenggan 28).

(2) Mahkamah ini mengguna pakai tiga peringkat ujian yang ditetapkan di hadapan Hakim Mahkamah Rayuan terhadap *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719. Mahkamah ini berpuas hati bahawa defendan telah menuntut hak milik atau kepentingan yang boleh didaftarkan ke atas tanah asing dalam bentuk harta atau hak untuk hak milik atau kepentingan tersebut sebagaimana yang dikehendaki di bawah s 323(1)(a) Kanun Tanah Negara dan dengan alasan ianya telah memenuhi ujian peringkat pertama. Walaupun plaintif telah mendakwa bahawa mereka telah menamatkan perjanjian JV tersebut dan defendan berhak mengembalikan hak plaintif, hal ini adalah satu soalan yang serius yang menjurus kepada merit perbicaraan kerana dakwaan tersebut hanya tepat jika perjanjian JV ditamatkan secara sah dan defendan telah mencabar penamatan kontrak oleh plaintif. Dengan defendan mencabar penamatan perjanjian JV, memohon perlaksanaan spesifik dan injunksi mandatori untuk memaksa plaintif untuk membenarkan menyiapkan projek dan tuduhan transaksi penjualan dan pembelian palsu yang dibuat hanya sehari selepas notis penamatan oleh peguam plaintif pada 11 November 2019, mahkamah lebih berpuas hati bahawa terdapat soalan-soalan serius merit perbicaraan dan mahkamah berpendapat bahawa defendan telah lulus ujian peringkat kedua. Mahkamah mendapati bahawa memandangkan dakwaan yang tidak dikakas, lebih adil kepada defendan untuk kaveat dikekalkan (lihat perenggan 38).

(3) Mahkamah ini berpendapat bahawa hujah bahawa perjanjian JV untuk pembangunan tanah membawa kepada pemaju usaha sama yang tidak mempunyai kepentingan kaveat adalah remeh. Sebaliknya, terma perjanjian usaha sama tersebut perlu ditafsirkan untuk terma dan kesannya. Di dalam kes ini, klausa dalam perjanjian JV mengenai hak pemilik dan hak mereka terhadap unit-unit tidak dijual boleh ditafsirkan secara munasabah bermakna bahawa plaintif hanya berhak kepada RM6 juta dengan semua unit adalah hak pemaju defendan (lihat perenggan 39–41).]

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 1 CLJ Rep 14, SC (refd)

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57; [1997] 2 CLJ 104, CA (refd)

Low Wee Hong v Tan Oh Chay @ Tan Woon Long & Anor [2013] MLRHU 1189, HC (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ

719; [1995] 3 CLJ 520, CA (folld)
Mosbert Berhad (in liquidation) v Stella D' Cruz [1985] 2 MLJ 446; [1985] 1 MLRA 558, SC (refd)
Perbadanan Setiausaha Kerajaan Selangor & Ors v Metroway Sdn Bhd & Anor [2003] 3 MLJ 522, CA (refd)
Score Options Sdn Bhd v Mexaland Development Sdn Bhd [2012] 6 MLJ 475; [2012] 6 MLRA 216, FC (refd)
Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor [1993] 3 MLJ 633, HC (refd)
Tan Ong Ban v Teoh Kim Heng [2016] 3 MLJ 23; [2016] 3 CLJ 193, FC (refd)
Wong Kuan Tan v Gambut Development Sdn Bhd [1984] 2 MLJ 113; [1984] 1 MLRA 321, FC (refd)
Zemine Development Sdn Bhd v Hong Kong Realty Sdn Bhd [2011] 4 MLJ 466; [2009] 5 CLJ 218, CA (refd)

Legislation referred to

National Land Code s 323, 323(1)(a), Form 19B
Rules of Court 2012 O 14 r 1
Specific Relief Act 1950 Act 137 s 26(a)

Andrew Soong Tze Toong (BH Koh, Soong, Zarin & Partners) for the plaintiff. Harold Tan Kok Leng (Harold & Lam Partnership) for the defendant.

Su Tiang Joo JC:

PROLOGUE

[1] The application by the plaintiff for summary judgment for the removal of a private caveat by way of O 14 r 1 of the Rules of Court 2012 ('O 14 r 1') in this action commenced by way of writ instead of by way of originating summons raises the interesting question of what is the test that is to be adopted by the court in disposing of the application; is it to be the 'no triable issue test' or the 'three-stage test' laid down by the Court of Appeal in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520. A consequential issue that arises would be in the event, the court were to adopt the three-stage test, would it mean that the decision would be binding and is res judicata for purposes of the action as laid down by the Court of Appeal in *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57; [1997] 2 CLJ 104.

INTRODUCTION

[2] In hearing the plaintiff's application for summary judgment the court is tasked with deciding the issue of whether the defendant developer under a joint-venture agreement and who is armed with an irrevocable power of

attorney to deal with the proprietary rights over the land including to let, lease, assign and create charges or any other encumbrances over the land has a caveatable interest in the land?

[3] The plaintiff landowner's application for summary judgment (encl 8) under O 14 r 1 is predicated on the answer being no and prayed for an order that the defendant's caveat over 17 lots of its land be removed.

[4] The defendant in this suit in another suit, AA-22NCvC-16–02 of 2020 ('Suit 16') is the plaintiff and is suing for, inter alia, specific performance of the joint venture agreement and is applying for a mandatory injunction to, inter alia, be allowed to enter onto the site to complete the works asserting it has completed almost 80% to 90% of the works (Suit 16 — encl 2 para 28, encl 9 para 41.2 and encl 52 para 5 exh CCU26).

[5] Suit 16 was ordered to be heard together with this suit on 14 September 2020 by Dato' Hashim bin Hamzah J pursuant to an application filed therein by the plaintiff (who is the defendant in this suit) with the defendant (who is the plaintiff in this suit) having no objections to the application.

[6] After hearing parties, the court dismissed the summary judgment application (encl 8) on 26 October 2020. Dissatisfied with the decision, the plaintiff appealed and this is the court's grounds of judgment. In this grounds, the parties are referred to as the plaintiff and defendant as in this action.

BACKGROUND

[7] The plaintiff is the registered landowner of 18 lots of land held under HS (D) 216239 PT 24150 until HS (D) 216254 PT 24165 and HS (D) 216256 PT 24167 all in Mukim Sungai Raya, Daerah Kinta, Negeri Perak (encl 2 para 3) ('18 lots of land').

[8] The 18 lots of land are charged to Affin Bank Bhd (hereinafter referred to as the 'chargee' or 'chargee bank' as the case may be').

[9] Under a joint-venture agreement ('JV agreement') made on 21 July 2017 with the plaintiff to develop the 18 lots of land, the defendant agreed to construct and complete 12 units of two-storey shop/office on PT 24150 to 24161, three units of four-storey shop/office on PT 24162 to 24164 and three units of two-storey shop/office on PT24165 to 24167 (encl 2 para 5(a)) ('the project').

[10] Clause 2.2 of the JV agreement provides that simultaneously with the execution of the agreement and upon the initial payment of RM100,000 the

plaintiff shall execute a power of attorney in favour of the defendant (encl 5 para 5b)). A

[11] A power of attorney dated 21 July 2017 was in fact given by the plaintiff to the defendant and duly registered with the registration number 56126/17 (encl 10 para 8 exh CCU1) ('PA'). B

[12] The defendant caused a private caveat (encl 7 exh TKH2) to be entered over the 18 lots of land under Presentation Number 19523/2019 ('the said caveat'). C

[13] Out of the 18 lots of land, one lot held under HS (D) 216255 PT 24166 with a building to be erected thereon to be completed by 20 December 2020 was sold pursuant to a sale and purchase agreement with the defendant as developer, the plaintiff as landowner and two co-purchasers, Siew Kok Hoo and Yip Che Yuw (encl 10 para 9) for RM800,000 leaving 17 lots of land ('the remaining 17 lots'). D

THE PLAINTIFF'S CASE

E

[14] The plaintiff took out a writ (encl 1) on 13 January 2020 and filed a statement of claim (encl 2) on 13 January 2020.

[15] It claims that the defendant has failed to obtain the requisite certificate of construction and completion for the buildings to be constructed on or before October 2019 and that the defendant had failed to pay the monthly instalment payments of RM37,652 per month due to the chargee bank for the months of September and October, 2019 and by reason thereto the defendant has breached the JV agreement and it is entitled to terminate the same. F G

[16] By notice dated 11 November 2019, the receipt of which was acknowledged by the defendant, the plaintiff terminated the JV agreement and had proceeded to sell the remaining 17 lots to various other purchasers (encl 2 para 3 and encl 7 para 3). H

[17] That on 3 January 2020, it came to know that the defendant had entered the said caveat which has caused it to be unable to complete its agreements of sale of the remaining 17 lots and by reason thereto has suffered damages including additional costs for construction and infrastructure such as drains and roads for the lot that was sold to Siew Kok Hoo and Yip Che Yuw. I

[18] The plaintiff claims (encl 2 para 21):

A (a) for a declaration that the JV agreement dated 21 July 2017 had been lawfully terminated;

(b) for a declaration that the defendant no longer has any interest over the 18 lots of land;

B (c) an order to cancel the PA dated 21 July 2017 under registration number 56126/17;

(d) that the said caveat be removed by the Registrar of Titles;

C (e) the Deputy Registrar be directed to assess the damages suffered by the plaintiff due to the said caveat entered by the defendant who is to be ordered to pay the same upon assessment;

(f) the Deputy Registrar be directed to assess the damages suffered by the plaintiff due to the breach of the JV agreement by the defendant who is D to be ordered to pay the same upon assessment;

(g) the defendant do pay interest at 5%pa on the damages assessed from the date of judgment until full satisfaction;

(h) costs; and

E (i) such further or other relief as this honourable court may deem fit and just.

THE DEFENDANT'S CASE

F

[19] The defendant in its defence filed on 6 March 2020 (encl 9) denied that it breached the JV agreement and rejected the plaintiff's purported termination of the same (encl 9 para 15) which it asserts as being unlawful.

G **[20]** In summary the defendant pleads that:

(a) the non-payment of the monthly instalments to the chargee bank arose from an arrangement made with the plaintiff's director, Mr Lee Chee Keong for the project under the JV agreement to be carved out before the H (shares of) plaintiff were to be sold to a third party (encl 9 para 12);

(b) the plaintiff's assertion that it had delivered vacant possession of the 18 lots of land to the defendant in September 2017 is incorrect because the plaintiff had failed at all material times to do so with the defendant having as at August 2017 informed the plaintiff of an unlawful I encroachment by a neighbouring structure on the 18 lots of land and at the very latest as at the date of the purported termination of the JV agreement by the plaintiff, the encroachment has yet to be removed (encl 9 paras 16.1 and 16.1);

(c) given the continuing encroachment, the plaintiff continues to fail to deliver vacant possession and time for the completion of the project under the JV agreement remains at large (encl 9 para 16.2);

(d) the plaintiff is estopped (encl 9 para 16.3) from claiming that the defendant is to complete the project within 24 months from September 2017 under the JV agreement when the plaintiff itself had breached its obligations under cll 3.4 and 7.1.2 of the JV agreement which are reproduced below:

(i) cl 3.4:

> Upon execution of this Agreement, the Owner (plaintiff) shall forthwith deliver up vacant possession of the said Land (18 lots of land) as may be required for the development of the Project to the Developer (defendant) to bring his workmen, equipment as may be necessary to fell trees and to fill, level and or clear that portion of the said Land for the development of the Project.

(ii) cl 7.1.2:

> To relocate and/or evict, at its sole costs and expenses, the squatters and/or occupiers present on the said Land and for such purpose enter into any arrangements as may be necessary with the squatters and/or occupiers thereof;

(e) the time for completion of the complete development under the JV agreement is at large (encl 9 para 16.4);

(f) the plaintiff failed to procure the necessary building plan approval, failed to pay its consultants and that the requisite approval from the Jabatan Kerja Raya came some 20 months after the JV agreement was entered into and by reason thereto, the defendant is entitled to claim for an appropriate extension of time to complete the project (encl 9 para 16.5);

(g) pursuant to cl 14.1 of the JV agreement, the agreement shall continue to be in force until the completion thereof, the completion of the sale thereof, and the completion of the transfer of the individual issue document of titles in the project to the purchasers or their respective nominees or is otherwise terminated by the defendant;

(h) by letter dated 15 November 2019 (encl 10 exh CCU6), the defendant through its previous solicitors, rejected the plaintiff's purported notice of termination of the JV agreement on the ground that it is unlawful and had given notice (encl 10 exh CCU6) dated 5 December 2019 that it is continuing with the works on site and demanded that the plaintiff not obstruct or hinder the defendant's workmen from continuing with the works on site;

(i) however, the plaintiff's continued hindrance has caused and will continue to cause damage to the defendant should the defendant be unable to complete and deliver the Lot PT24166 on time; and

(j) in order to protect the defendant's rights and interest in the said 18 lots of land the defendant had on 6 December 2019 lodged private caveats over the 17 remaining lots.

[21] The defendant claims it remains ready, able and willing to continue with the project.

[22] The defendant came to know later that the plaintiff had purportedly sold the remaining 17 lots to third party purchasers via 17 separate sale and purchase agreements all dated 12 November 2019 with all these purchasers having on 15 November 2019 entered private caveats ('third party caveators') over the respective lots said to have been purchased by them (encl 9 para 17.8 and encl 10 paras 12.13 and 12.14 exh CCU19).

[23] The defendant asserts that all these sales to these third-party purchases are but sham transactions as each of them had only paid RM1,000 by way of deposit and the sale and purchase agreements are all purportedly made only one day after the purported notice of termination of the JV agreement (encl 10 para 12.15).

[24] By notices dated 4 February 2020 (encl 10 para 12.16 and exh CCU10), the defendant through its solicitors to all the third party caveators gave notice of its interest in the remaining 17 lots and asked each of them for information as to the circumstance leading to their purported purchase and for a copy of their respective sale and purchase agreements but up to the date of it filing Suit 16 on 18 February 2020, no response has been received from any of them.

THE PLAINTIFF'S APPLICATION FOR SUMMARY JUDGMENT (ENCL 8)

[25] Against the backdrop of the assertions by both the plaintiff and the defendant the following issues can be distilled:

(a) were there any breaches of the JV agreement?

(b) was it the plaintiff of the defendant who were in breach of the JV agreement or were there breaches by both parties?

(c) was the plaintiff lawfully entitled to terminate the JV agreement premised upon the defendant's alleged breach of the JV agreement and claim for damages?

(d) and closely intertwined with the above, does the plaintiff's termination of the JV agreement amount to a repudiatory breach as to entitle the defendant to refuse to accept the same and seek specific performance plus damages? and

(e) are the sale and purchase agreements for each of the remaining 17 lots sham transactions?

APPLICATION FOR SUMMARY JUDGMENT FOR ONLY A PARTICULAR CLAIM

[26] However, the plaintiff in its application for summary judgment made pursuant to O 14 r 1 is not asking the court to consider the aforesaid issues.

[27] Instead, the plaintiff asserts that in a joint venture agreement between a landowner and a developer, the rights of the developer sounds only in money in the form of proceeds of sale under the project (encl 7 para 5) and by reason thereto the developer has no caveatable interest in the land and therefore, it prays for summary judgment to be entered against the defendant for an order that the said caveat over the remaining 17 lots of land be removed forthwith.

[28] The court is satisfied that the plaintiff is entitled to do this because O 14 r 1 which is reproduced below allows the plaintiff to apply for summary judgment on the ground that the defendant has no defence to a particular part of a claim:

> Where in an action to which this rule applies a statement of claim has been served on a defendant and that the defendant has entered appearance in the action, *the plaintiff may, on the ground that the defendant has no defence* to a claim included in the writ, or *to a particular part of such a claim*, or has no defence to such a claim or part thereof *except as to the amount of any damages claimed, apply to the Court for judgment against the defendant*. (Emphasis added.)

[29] Besides setting out the facts about the JV agreement and the said caveat, the plaintiff in its written submissions (encl 14) drew the court's attention on the authority of *Mosbert Berhad (in liquidation) v Stella D' Cruz* [1985] 2 MLJ 446; [1985] 1 MLRA 558 (FC) where the late Seah FCJ held:

> For the purpose of deciding whether a private caveat is defective or void the High Court should confine itself to the caveat and other relevant supporting documents. The procedure to be adopted should be a simple and summary one.

[30] Reliance was also placed by the plaintiff on the following cases:

(a) *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520 (CA) on the three stage test to be adopted for the

removal of caveat viz, the first stage is the examination of the grounds expressed in the application for the caveat to ascertain whether the caveator's claim amounts in law to a caveatable interest; the second stage is to go on to see whether based on the affidavits filed, his claim discloses a serious question meriting trial and after crossing these two stages, the third is to ascertain where the balance of justice or convenience lie;

(b) *Low Wee Hong v Tan Oh Chay @ Tan Woon Long & Anor* [2013] MLRHU 1189 (HC) for the principle that if the caveator's claim to any interest in the proceeds of sale concerned personal rights or rights in personam as distinguished from rights in rem, then the caveator was not a claimant to title or registrable interest in the land and by reason thereto the caveat ought to be removed;

(c) *Perbadanan Setiausaha Kerajaan Selangor & Ors v Metroway Sdn Bhd & Anor* [2003] 3 MLJ 522 (CA) where the plaintiff read the following passage:

> It is established by authority that a joint venture agreement to develop land and to share proceeds of the development does not confer a caveatable interest even if the agreement itself expressly provides for entry of a caveat. See *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113; [1984] 1 MLRA 321; [1984] 1 CLJ Rep 441 per Hashim Yeop Sani SCJ (sic).

(d) *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113; [1984] 1 MLRA 321 (FC) where at p 116 (MLJ); pp 324–325 (MLRA) the Federal Court speaking through Hashim Yeop Sani FJ held that the:

> 'interest' of the caveator was merely 'the unpaid balance of the purchase price' and 'an unsecured civil debt is a mere personal claim and did not come within the meaning of 'interest' in s 320(1) of the National Land Code'... 'the right to lodge the caveat ... was a contractual right applicable only when [the] purchase price is not fully paid. But this alone cannot create a caveatable interest in the land'... The words 'any right to such title or interest' may be wide enough to allow rights arising under a contract for registrable dealing to be protected by a caveat but they are not wide enough to cover mere personal rights as distinguished from rights relating to land. See David Wong; *Land Tenure in the Malay State* — pp 416–435 (Emphasis added.)

(e) *Score Options Sdn Bhd v Mexaland Development Sdn Bhd* [2012] 6 MLJ 475; [2012] 6 MLRA 216 (FC) where Arifin Zakaria CJ speaking for the Federal Court held at paras [39] and [44]:

> [39] It is also our considered view that the caveator under s 323(1)(a) of the NLC must have a present interest as opposed to a potential interest in the land. The registrable interest that the caveator is claiming for, must be an existing interest. The caveator under s 323(1)(a) of the NLC *must be limited to those who are claiming to an existing interest or right to such existing interest and cannot include potential interest or interest in future.*

...

[44] In the present case, even though the respondent was given the option to purchase the units it developed and transfer the units to itself if it chooses to do so, that right has yet to be exercised at the time when the caveat was lodged. Therefore, the right has not ripened into an interest in the land.

[31] The plaintiff drew the court's attention to cl 14.4 of the JV agreement where it is provided that in the event of breach by the plaintiff the defendant shall *only* seek reimbursement of the plaintiff's entitlement together with the sale cost and in exchange the defendant shall redeliver to the plaintiff the 18 lots of land on an as-is-where-is condition (see encl 19 written submissions in reply of plaintiff paras 14–15 but there is an obvious typographical error in para 15 where in line 4 thereof 'plaintiff' was referred to as 'defendant'). At this juncture it is pertinent to add that the court observed that cl 14.4 (encl 7 exh TKH1) however, does not carry the word 'only' and that in fact cl 14.3 gives the defendant the discretion of seeking an order for specific performance against the plaintiff.

[32] In opposing the application for summary judgment, the defendant concentrated its attention on the salient terms of the JV agreement and in particular to cll 4.1, 5.1 (inadvertently numbered as cl 8.1) to 5.5, 14.1, 14.3 (as observed above *which provides that the defendant shall be entitled to the remedy of specific performance*) and 20. (Emphasis added.)

[33] In a nutshell, the defendant submits that the defendant has a caveatable interest in the land as it has not only a right in personam but also a right in rem. It submits that under the JV agreement the plaintiff's entitlement is (only) to the sum of RM6m (cl 5.1) payable by way of an initial payment of RM100,000 with the balance payable by way of monthly instalments of RM37,652 to the chargee bank commencing August 2017 until full redemption and if all 18 lots are sold, the balance shall be paid in a lump sum in cash immediately and if not, the plaintiff shall take the unsold intermediate two-storey unit valued at RM750,000 *and* (under cl 5.2.2(c)(ii)) *the defendant shall have the discretion on the selection of the unit(s) to be given to the plaintiff.* (Emphasis added.)

[34] The defendant emphasized that under cl 5.5 of the JV agreement, the defendant shall be authorized to forward to the chargee bank, the redemption sum derived from the plaintiff's entitlement and *receive* from the chargee the release of *the issue documents of title*.

[35] Just like the plaintiff, the defendant relied upon the authority of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520 (CA) but submits that on the facts that obtain in this case, the defendant's interest in the remaining 17 lots are caveatable, there are

serious questions to be tried and the balance of convenience favours the defendant.

[36] The defendant referred to the authority of *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ Rep 14 (SC) for the trite principle of law that summary judgment ought not to be entered when there is even one issue that needs to be tried and it would be instructive to refresh ourselves on the following excerpt from the decision of Mohd Azmi SCJ at p 414 (MLJ); p 25 (CLJ) of the report:

> The defence need only show that there is a triable issue or question or that for some other reason there ought to be trial, and leave to defend ought to be given. In fact, even though the defence is not clearly established, but only reasonable probability of there being a real defence, leave to defend should be given (*Manager v Cash* [1889] 5 TLR 271)

COURT'S APPROACH

[37] The court had proceeded as invited by the plaintiff to decide whether it is entitled to summary judgment on the narrow premise of whether the caveat should be allowed to remain.

[38] Guided by the three-stage test laid down in the Court of Appeal authority of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor*, the court found as follows:

(a) first stage: examination of the grounds expressed in the application for the caveat (encl 7 exh TKH2):

(i) the ground set out by the defendant in the Form 19B is that the plaintiff, the registered owner of the (18 lots of land) had entered into a Joint Venture Agreement dated 21 July 2017 to develop the project comprising 18 units of shop/office on the said lots for RM6m funded by the defendant; the issue documents of title are currently held by Affin Bank Bhd as chargee; the redemption sum is being settled by instalments and once settled, *the properties will be transferred to the defendant* or purchasers that the defendant procures and to protect its rights the caveat has to be entered;

(ii) in the Form 19B the defendant made mention of the JV agreement of 21 July 2017 and that the properties, which are the 18 lots of land, were to be transferred to it;

(iii) the court was satisfied that premised on the aforesaid, the defendant has claimed title to or a registrable interest in alienated land in the form of the 18 lots of land or a right to such title or interest as is required under s 323(1)(a) of the NLC which is reproduced below

and by reason thereto has satisfied the first stage test;

(iv) s 323(1)(a) of the NLC provides that:

> The persons or bodies at whose instance a private caveat may be entered are any person or body claiming title to, or any registrable interest in, any alienated land or undivided share in alienated land or any right to such title or interest.

(v) on the claim by the defendant about having entered into a JV agreement with the plaintiff, the court is of the opinion that whether it entitled the defendant to have a registrable interest in the 18 lots of land would be better dealt with at the second-stage which the court go to now as the court will also be dealing with the plaintiff's submissions and the case authorities the plaintiff had relied upon based upon the evidence led in the application for summary judgment (encl 8) for the removal of the caveat.

(b) second stage: to see whether based on the affidavits filed, the defendant's claim discloses a serious question meriting trial:

(i) the Court of Appeal authority of *Perbadanan Setiausaha Kerajaan Selangor & Ors v Metroway Sdn Bhd & Anor* relied upon the Federal Court authority of *Wong Kuan Tan v Gambut Development Sdn Bhd* which at the risk of repetition held that '*The words 'any right to such title or interest'* (under s 323(1)(a) of the NLC) *may be wide enough to allow rights arising under a contract for registrable dealing* to be protected by a caveat but they are not wide enough to cover mere personal rights *as distinguished from rights relating to land.* (Emphasis added.);

(ii) in the circumstances, the court has to look at the contract to see whether it allows for rights for registrable dealing;

(iii) pursuant to cl 2.2 of the JV agreement (encl 7 exh TKH1) the plaintiff gave the defendant the PA dated 21 July 2017 (encl 10 exh CCU1) for valuable consideration and expressed it to be irrevocable for as long as the JV agreement is not terminated;

(iv) under this PA, the defendant was given most, if not, all the rights of the plaintiff as a registered proprietor of the 18 lots of land including to sign all sale and purchase agreements and memoranda of transfer, create a charge, lien, assignment and/or other assignment, let, lease, transfer and/or assign the said 18 lots of land and in cl 10 thereof, it was expressly provided that the defendant has the power to do all acts and things and execute all documents that are required of the plaintiff to do as the registered owner for carrying out and completing the development.

(v) in *Wong Kuan Tan v Gambut Development Sdn Bhd*, the contract under consideration was held insufficient because it was only to protect the balance of the purchase price;

(vi) unlike the joint-venturer in the Federal Court authority of *Score Options Sdn Bhd v Mexaland Development Sdn Bhd*, by virtue of the PA, the defendant herein has an *existing interest* in the 18 lots of land with the execution of the JV agreement and the PA given for valuable consideration both on the same day;

(vii) the existing interest was underscored by the terms of the JV agreement wherein the plaintiff was only entitled to a sum of money to the sum of RM6m and it is *for the defendant* (and not the plaintiff) *to select* which lots the plaintiff was to get if the units constructed were not sold (see cl 5.2(c)(ii) of the JV agreement in encl 7 exh TKH1);

(viii) while the plaintiff has claimed that it has terminated the JV agreement and that the defendant is only entitled to be refunded the plaintiff's entitlement (as per cl 14.4 of the JV agreement), this is a serious question meriting trial because such assertion is only accurate if the JV agreement was *lawfully* terminated and as narrated above, the defendant challenges the plaintiff's purported termination (encl 9 para 15 and encl 10 exh CCU6);

(ix) over and on top of the aforesaid, the defendant has refused to accept the purported termination of the JV agreement as to bring it to an end and is instead claiming for specific performance of the JV agreement, a right which is expressly and contractually provided to the defendant by way of cl 14.3 of the JV agreement (encl 9 exh TKH1) and under the law.

(x) pursuant to s 26(a) of the Specific Relief Act 1950 Act 137, specific performance may be enforced against either party to a contract;

(xi) armed with the PA coupled with the claim for specific performance the defendant can lawfully claim to be at least a beneficial owner of an interest in whole or in part of the ten lots of land. In *Tan Ong Ban v Teoh Kim Heng* [2016] 3 MLJ 23; [2016] 3 CLJ 193 (FC) at paras [38]–[39] where Arifin Zakaria CJ speaking for the Federal Court held that:

> In short, a beneficial or equitable owner of a property stands in the same position as the legal owner in terms of enforcing proprietorship rights against the world at large. The only difference is that a beneficial owner is yet to be vested with the legal title.

(xii) these rights will be conferred immediately after the parties entered into the contract which in this case is the JV agreement of 21 July

2017 which conferred upon the defendant beneficial or equitable rights over the 18 lots of land and to seek specific performance and in the process it has the legal right to have the caveat entered over these 18 Lots to protect its beneficial or equitable interest pursuant to s 323(1)(a) of the NLC;

(xiii) with the defendant challenging the purported termination of the JV agreement, seeking specific performance of the same, seeking a mandatory injunction to compel the plaintiff to allow it to complete the project and the allegations of the sham sale and purchase transactions entered into (only) one day after the purported notice of termination issued by the plaintiff's solicitors on 11 November 2019, the court is more than satisfied that there are serious questions meriting trial and the court held that the defendant has passed the second stage test;

(xiv) before leaving the second stage, as mentioned earlier, the issue of caveatable interest can also be determined here under discussions of rights arising from the JV agreement; and

(xv) with the defendant being entitled to a percentage of the 18 lots of land and the right to select which lots the plaintiff were to obtain, the Court of Appeal authority of *Zemine Development Sdn Bhd v Hong Kong Realty Sdn Bhd* [2011] 4 MLJ 466; [2009] 5 CLJ 218 is particularly relevant to the instant case as the Court of Appeal held that the respondent developer's entitlement to a percentage of the subdivided lots gave the respondent beneficial interest in the land and by reason thereto has a caveatable interest in the land. This further support the defendant's caveatable interest in the 18 lots of land.

(c) third stage: to ascertain where the balance of justice or convenience lie:

(i) the defendant asserted that it has completed 80% to 90% of the project (Suit 16 — encl 2 para 28, encl 9 para 41.2 and encl 52 para 5 exh CCU26) and this assertion has not been credibly rebutted by the plaintiff;

(ii) without making a definitive finding at this interlocutory stage on whether this assertion is a fact, the court finds that given the unrebutted assertion at this stage, the balance of convenience favours the defendant for the caveat to remain. On this the court finds support by relying upon the doctrine of substantial performance which has been clearly elucidated by the eminent jurist, Edgar Joseph Jr J (as His Lordship then was) in *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633 (HC) for the principle that where a party has put in a tremendous amount of work and money in discharging obligations under his contract, the

court can invoke the doctrine of substantial performance in favour of the party to order specific performance; and

(iii) needless to say that if specific performance of the JV agreement is ordered in Suit 16 which is to be heard together with this action, if not earlier, the defendant herein who is armed with the irrevocable PA would be entitled to deal with the 18 lots of land just as if it were the registered proprietor.

[39] Having the gone through the authorities cited by the plaintiff, with all due respect, the court is of the opinion that it would be too simplistic an argument to assert that a joint-venture agreement for the development of land simpliciter by itself will conclusively lead to a joint-venturer developer having no caveatable interest.

[40] Instead, the terms of the joint-venture agreement should be studied and construed for its terms and effects. If for eg there is an express term or the court were to construe or infer that there is a term to the effect that the joint-venture agreement were to vest the land or interest in the land upon the joint-venturer developer, the latter will have a registrable interest capable of protection by private caveat under s 323 of the NLC (Act 828) as was so held in *Zemine Development Sdn Bhd v Hong Kong Realty Sdn Bhd*. Arifin Zakaria CJ speaking for the Federal Court in *Score Options Sdn Bhd v Mexaland Development Sdn Bhd* referred to *Zemine Development Sdn Bhd v Hong Kong Realty Sdn Bhd* and held that:

> [33] In our considered view, *Zemine Development Sdn Bhd v Hong Kong Realty Sdn Bhd* could not support the respondent's case: it is clearly distinguishable on the facts. In that case, the appellant as the land owner entered into a joint venture agreement with the respondent to develop residential and commercial buildings. *Under that agreement, a sharing arrangement was agreed to where the appellant will be entitled to 20% of the buildings built while the respondent will retain the remaining 80%*. The Court of Appeal affirmed the High Court's decision and held that the respondent has a caveatable interest in the land by virtue of its entitlement to 80% of the subdivided lots of the land. *However, in our case here, what the respondent had under the JVPM Agreement was not any share in the subdivided lots or units of buildings on the land*, but merely a share in the profits under the GDV. It is purely a share in the profits and not in the land.

[41] With all due respect, the court is of the opinion that Arifin Zakaria CJ in the Federal Court authority of *Score Options Sdn Bhd v Mexaland Development Sdn Bhd* had made it clear that the court has to look at the joint venture agreement to see whether the developer was to have any share in the subdivided lots or units of buildings on the land and in the instant case, the clauses in JV agreement on the owner's entitlement (encl 6 cll 1.1 and 4), developer's entitlement (cll 1.1 and 4) and how they are to be apportioned if the

units are not sold (cl 5.2.2(c)(iii)) can reasonably be construed to mean that the plaintiff landowner is only entitled to RM6m with all the units being the entitlement of the defendant developer.

CONCLUSION

[42] In the upshot, subject to the epilogue now following, the court dismissed the application for summary judgment in encl 8 with costs of RM10,000 subject to allocatur to the defendant.

EPILOGUE

[43] The Court of Appeal in *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57; [1997] 2 CLJ 104 at paras [2] and [3] held that:

> [2] It cannot be over-emphasised that once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be re-opened willy-nilly.
>
> [3] The principle of res judicata is based upon the need of giving a finality to judicial decisions, when a matter, whether on a question of fact or law, has been decided between two parties in one suit or proceeding and the decision is final, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata applies also as between two stages in the same litigation to the extent that a court, whether the trial court or a higher Court having at an earlier stage decided the matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. The parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication. A failure to adhere to these principles may lead to chaos in the conduct of civil proceedings.

[44] Wherefore, although the court in determining the application for summary judgment for the removal of a private caveat was required to make a determination of whether the defendant/caveator has a caveatable interest in the 17 remaining lots, the court is also conscious that the application was one predicated upon O 14 r 1 whereby with it having been dismissed, given the peculiar circumstances of this case, besides the appeal against the decision of 26 October 2020, the parties shall be at liberty to re-agitate the issues canvassed herein during trial.

Application dismissed with costs.

Reported by Muhamad Azham Marwan